United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,065

UNITED STATES OF AMERICA

v.

JERRY L: GREEN

Appellant

Appeal From A Judgment Of Conviction
Of The United States District Court For
The District of Columbia

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References to Rulings

(1) Transcript p. 28-29. That the conspiracy need not be shown before hearsay may be admitted under the conspirator exception to the hearsay rule.

TABLE OF CASES

ISSUES PRESENTED

(1) Whether the conspiracy was proven by substantial independent evidence as justifies the co-conspirator exception to the hearsay rule?

(2) Whether in all the circumstances presented in the case, the conviction may stand based on the uncorraborated testimony of co-conspirators?

(3) Whether the element of knowledge of illegal importation may in this case be inferred in a prosecution under 21 U.S.C. Section 174?

This case has not previously been before the Court.

STATEMENT OF THE CASE

The theory of the government's case against appelland was that he was the second man in a narcotics conspiracy in which Stanley R. Austin was the major figure. The evidence presented to support this theory may be separated into two parts, testimony of disinterested witnesses and testimony of accomplice witnesses.

The disinterested witnesses were Troussant D. Lett, Irmagarde Juliet Lett and David Connally. These persons were disinterested in the sense that they had no identifiable thing to gain by testifying. The last named, Mr. Connally, was an expert witness who testified as to the origin of narcotic drugs. The testimony of Troussant Lett and Irmagarde Lett showed only that appellant was occasionally with Stanley R. Austin and inferred that appellant was a user of narcotics. The testimony of

neither tended to otherwise link appellant to a conspiracy.

The two interested witnesses were John Colligan and William J. Rodgers. Both of these witnesses were admittedly deserters from the Marine Corps, narcotic users (Transcript p. 146, 308,312), under charges in the Marine Corps and with an agreement that they would

not be prosecuted for any civilian offense (Transcript p. 201, 228). Although the trial record does not indicate so, an article appearing after trial in the January 1, 1970 Washington Post, p. A 9, revealed that two years of a three-year prison sentence imposed by the Marine Corps had been commuted and that he had been given "relocation money".

The tewtimony of these interested parties indicated that they had first met Stanley R; Austin and appellant in the Fall of 1968. That thereafter for approximately three months they sold narcortics which in turn had been wholesaled to them by Austin and appellant.

Colligan testified that the first time he met appellant was when the latter knocked on his door and asked him if he wished to sell narcotics (Transcript p. 13). Thereafter an agreement was made according to Colligan (Transcript p. 19). By this agreement Colligan was to sell narcotics given to him by Austin and appellant (Transcript p. 18-20).

Thereafter a series of exchanges between Austin and appellant and Colligan and Rodgers were testified to. Throughout this testimony numerous items were admitted which were hearsay, as detailed hereinafter.

This hearsay was admitted by the trial judge on the grounds that a conspiracy could be established and members included as the testimony progressed that it was not necessary that it be established before the hearsay is admitted (Transcript p. 31, 32). The total number of such exchanges was more than ten but less than fifty (Transcript p. 33).

Appellant's connection with this operation described in Colligan's testimony was as an "errand boy" (Transcript p. 81).

Appellant was convicted Conspiracy To Sell Narcotic Drugs (26 U.S.C. Section 4705, 7237) and Conspiracy To Receive And Conceal Narcotic Drugs; Knowing Same to Have Been Imported Contrary To Law (21 U.S.C. Section 174).

SUMMARY OF ARGUMENT

(1) There was no proof of conspirary prior to the admission of hearsay under the co-conspirator exception and further there was no instruction to the jury concerning hearsay not given by members of the alleged conspiracy and the case must therefore be reversed.

(2) There is no evidence tending to prove the guilt of appellant other than that of two witnesses who admitted being co-conspirators who had testified in return for a promise not to be prosecuted and such a conviction is not supported by sufficient credible evidence to stand.

(3) There was no proof in the case that appellant possessed narcotics so as to bring the inference into operation and the inference cannot operate as to imply knowledge of possession in this case.

ARGUMENT

I

(1) THAT THERE WAS NO PROOF OF CONSPIRACY PRIOR TO THE ADMISSION OF HEARSAY UNDER THE CO-CONSPIRATOR EXCEPTION AND FURTHER THERE WAS NO INSTRUCtion to the jury concerning hearsay NOT STATED BY MEMBERS OF THE ALLEGED CONSPIRACY AND THE CASE MUST THEREFORE BE REVERSED;

When hearsay testimony was first offered, objection duly made and the trial judge called upon to rule, he held that the conspiracy need not be shown before hearsay was allowed rather that it could be established in the course of of the trialand the only requirement was that the fact be found from the evidence before the case went to the jury (Transcript p. 28-29). Thereafter there was no attempt by the trial judge to indicate in his rulings whether or not he felt that the evidence showed that the source of the hearsay was a member of the conspiracy or not.

In at least three instances hearsay testimony was admitted from sources that were never identified as co-conspirators. John Colligan was allowed to testify

as to source of Narcotics, which information was in fact given to him by a Mary Reilly who was never identified as a part of the conspiracy.

Colligan later testified extensively as to the price of narcotics, being unable to identify the source of the hearsay as well as identifying one Earl Lett from hearsay (Transcript p. 47-49). Colligan later related testimony from an unknown source as to a shooting with some inference that the shooting was at the instance of the appellant and/or Stanley Austin. This source was not identified in any manner.

It is submitted that the ruling of the trial judge was error in that the conspiracy must be proven and the source of the hearsay shown to be within it before the hearsay comes within the co-conspirator exception to the hearsay rule. Delli Paoli v. United States, 352 U.S. 232, 77 S. Ct. 294, 1 L. Ed. 2d 278 (1957). To hold otherwise would be to allow hearsay to pull itself by its own bootstraps. Glasser v. United States, 315 U.S. 69, 62 S. Ct. 457, 86 L. Ed. 680, rehearing denied 315 U.S. 827, 62 S. Ct. 629, 86 L.Ed. 1222 (1942).

It is not enough to show that the persons concerned were engaged in similar acts. It must be proved that they were engaged in a common endeavor. Winchester and P. Mfg. Co. v. Creary, 116 U.S. 161, 6 S.Ct. 369, 29 L. Ed. 591 (1885).

Furthermore, the commission of merely incidental acts does not raise a conspiracy or bring a person within one. Krule witch v. United States, 336 U.S. 440, 69 S. Ct. 716, 93 L. Ed. 790 (1949).

In this jurisdiction the rule has been stated to be that there must be substantial independent evidence of the conspiracy introduced before out of court statements will be allowed. Laughlin v. United States, 128 U.S. App. D.C. 27, 385 F. 2d 287, cert. denied 390 U.S. 1003, 88 S. Ct. 1245, 20 L.Ed. 2d 103 (1967); Taylor v. United States, 104 U.S. App. D.C. 219, 260 F. 2d. 737 (1959); May v. United States, 84 U.S. App. D.C. 233, 175 F. 2d 994, cert. denied, 338 U.S. 839, 70 S. Ct. 58, 94 L. Ed. 505, withheld 70 S. Ct. 154, rehearing denied, 338 U.S. 882, 70 S. Ct. 154, 94 L. ed. 542 (1949).

Generally the requirements for admission of hearsay under the conspiracy exception to the hearsay rule are:

(1) That the hearsay statement was made by a conspirator;

(2) That it is introduced against a conspirator;

(3) The conspiracy is pending at the time of the statement;

(4) The statement is in furtherance of the object of the conspiracy;

(5) There is evidence aliunde that all persons, i.e. declarant and defendant, combined in a common enterprise.

See Annotation, 1 L. Ed. 2d. 1780.

The ruling of the trial judge in this case prevented any meaningful record from being established detailing what the alleged conspiracy was doing, its members or limits. For this reason alone the case should be reversed for retrial. However, the record is sufficiently detailed that the instances above mentioned are seen to have prejudiced the case against the appellant.

It is submitted that the hearsay was admitted without first establishing the requirements above set forth and that in so doing the trial court committed reversible error for which the case should be remanded for new trial.

II

THERE IS NO EVIDENCE TENDING TO PROVE THE GUILT OF APPELLANT OTHER THAN THAT OF TWO WITNESSES WHO ADMITTED BEING CO-CONSPIRATORS WHO HAD TESTIFIED IN RETURN FOR A PROMISE NOT TO BE PROSECUTED AND SUCH A CONVICTION IS NOT SUPPORTED BY SUFFICIENT CREDIBLE EVIDENCE TO STAND;

This jurisdiction has not adopted the rule prevailing in other jurisdictions that a conviction cannot be sustained on the uncorroborated testimony of a co-conspirator. See Colt v. United States, 160 F. 2d 650 (5 Cir. 1947); Smith v. United States, 224 F. 2d 58 (5 Cir. 1955). Yet the reasons for such a rule are pertinent to this case. The testimony of a co-conspirator is inherently unreliable because it is usually predicated on some sort of arrangement worked out between the co-conspirator and the prosecution and this has been recognized even on those cases where corroboration

not absolutely required. See Cominetti v. United States, 242 U.S. 470, 37 S. Ct. 192, 61 L. Ed. 442 (1916).

There seems no good reason why the reluctance of this Court to set down a general rule requiring corroboration would prevent it from examining the sufficiency of an individual conviction. See State v. Owen, 415 F. 2d 907 (Arizona 1966), holding it plain error for the trial judge to fail to charge the jury that testimony of a co-conspirator had to be corroborated. Such a policy of individual examination would seem to be followed in at least onejjurisdiction. See State v. Yancey, 145 N.W. 2d 145 (Wisconsin 1966). Furthermore this jurisdiction recognized the need for corroboration in other situations where the likelihood as mistake or perjury seems high, i.e. sex crimes.

In the present case the record spells out two factors which compel the Court's attention:

(1) The two witnesses whose testimony tended to incriminate appellant faced a large variety of military and civilian charges with relation to which admittedly a deal had been made;

(2) The testimony of all other witnesses tended

show that [illegible]

show that the theory of the prosecution was not valid;

(3) The alternative to prosecution of appellant was prosecution of the conspirator witnesses for the prosecution;

(4) Both witnesses were admitted drug addicts.

While it has been held by several courts that the uncorroborated testimony of a drug addict is sufficient to sustain conviction (People v. Johnson, 221 N.E. 2d 59 (Illinois 1967); Tobar v. State, 145 N.W. 2d 782 (Wisconsin 1967)) this, together with their status as conspirators serves to diminish the weight of their testimony.

The record is rife with contradictions between the testimony of Colligan and that of Rodgers. Colligan stated that he was with Mary Reilly alone when Austin came to the door and had an argument with Mrs. Reilly concerning money to be sent to her husband (Transcript p. 10) and Rodgers stated that he had been there too (Transcript p. 320). Colligan testified that his sale to "Bill" was in an alley to begin with (Transcript p. 19) and Rodgers that the transfer had been entirely in the apartment (Transcript p. 320). There were various other discrepancies as to amount of narcotics, etc.

Appellant does not request that the Court adopt the more liberal rule requiring corroboration in all cases. Government of the Virgin Islands v. Solis, 359 F. 2d 518 (3 Cir. 1966); People v. Osuna, 452 P. 2d 472 (California 1969); Tellis v. State, 445 P. 2d. 938 (Nevada 1968); McIntyre v. State, 431 S.W. 2d. 5 (Texas 1968). The appellant only requests that the Court adopt the view that each conviction will be examined with caution recognizing the unreliability of this type of testimony. State v. Yancey, supra.

Appellant submits that a careful review of the entire record in this case shows that the factors are present which have compelled the courts to require corroboration and that based on the testimony above referred to the evidence is not sufficient to sustain the conviction.

Appellant submits that the casemmust be remanded with instructions to enter a judgment of not guilty.

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THERE WAS NO PROOF IN THE CASE THAT APPELLANT POSSESSED NARCOTICS SO AS TO BRING THE INFERENCE INTO OPERATION AND THE INFERENCE CANNOT OPERATE AS TO IMPLY KNOWLEDGE OF POSSESSION IN THIS CASE;

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21 U.S.C. Section 174 provides in part that "possession of the narcotic drug... shall be deemed sufficient evidence to authorize conviction".

The above section is constitutional provided that it is supported by a factual basis that the substance posesssed by the appellant-defendant must have come from outside the United States and unconstitutional as to substances which may be domestically produced or legally imported. Turner v. United States, 396 U.S. 398, 24 L. Ed. 2d 610, 90 S. Ct. 642 (1970).

In the present case the only testimony that the substances being handled consisted in some part of heroin consisted of testimony as to effect by Colligan and Rodgers (Transcript p. 22, 133).

The trial judge instructed that:

> "Now, knowledge of the illegal importation of a narcotic drug is an essential element of the crime that is charged in this second count of the indictment, and this knowledge may be proved by actual knowledge of its illegal importation on the part of the defendant, or this knowledge may be inferred if the Government has proved actual possession of heroin by a defendant." (Transcript p. 673).

The defendants had requested an instruction simply that "the defendant did so knowing the narcotic drug to have been illegally imported". This request was denied by the trial judge.

An official Department of Defense publication lists the following drugs as have the same effect or a similar effect as heroin: morphine, codeine, paragoric, meperdine, methadone and some types of glue (See Drug Abuse Game Without Winners, U. S. Government Printing Office, Washington, D. C.). This analysis is generally accepted by other authorities (See Drug Dependence, A Guide For Physicians, American Medical Association, 1969). The above are all to some extent legally manufactured and dispensed in the United States. One study shows that in the year 1963 there were 1,043,663,330 doses of legal "opiates", i.e. includes all of the above drugs except meperidine, dispensed in the United States (Task Force Report: Narcotics And Drug Abuse, The President's Commission On Law Enforcement And Administration Of Justice, U.S. Government Printing Office, Washington, D. C., 1967).

There is hardly sufficient evidence here of illegal importation or knowledge of same.

It is submitted that Turner v. United States, supra, precludes the use of the statutory inference in this case and the case must be reversed and remanded for a new trial.

CONCLUSION

Wherefore, appellant prays that the Court reverse the conviction as to all counts and further states that the appropriate relief should the Court reverse on the first issue or the third issue presented in appellant's brief without reversing on the second issue is to remand with instructions to grant a new trial and should the Court reverse on the second issue the appropriate relief is to remand the case with instructions to enter a judgment of acquittal.

Respectfully submitted

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CERTIFICATE OF SERVICE

Attorney For Appellant herewith certifies that a copy of the foregoing was mailed, postage prepaid, to the United States Attorney For the District Of Columbia, this day of 1971.

Thomas Fortune Fay

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,065

UNITED STATES OF AMERICA, APPELLEE

v.

JERRY L. GREEN, APPELLANT

Appeal from the United States District Court for the District of Columbia

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Cr. No. 1553-69

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OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUE PRESENTED *

In the opinion of appellee, the following issue is presented:

Whether there existed sufficient independent evidence of appellant's participation in a conspiracy to sell heroin so as to warrant the jury's consideration of extrajudicial declarations of co-conspirators as substantive evidence of appellant's guilt.

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a four-count indictment filed September 22, 1969, Stanley R. Austin and Jerry L. Green were charged with conspiring to convey narcotic drugs and receive heroin in violation of 26 U.S.C. § 4705 (a), 26 U.S.C. § 7237 (b) and 21 U.S.C. § 174.[1] Additionally Austin was charged with carrying a pistol without a license and possessing a machine gun in violation of 22 D.C. Code §§ 3204 and 3214 (a). On December 15, 1969, they appeared before

[1] Each conspiracy count alleged nineteen overt acts, thirteen of which were stricken at the close of the Government's case.

Judge Aubrey E. Robinson, Jr., for trial, and on December 23 both were found guilty by a jury of the two conspiracy charges. The count charging Austin with carrying a pistol without a license was dismissed at the close of the Government's case, but he was found guilty of possessing a machine gun. On February 26, 1970, Green was sentenced to serve five to fifteen years on each of the two conspiracy counts, the sentences being ordered to run concurrently. This appeal followed.[2]

At trial the Government's evidence showed that in late 1968 John D. Colligan and Earl M. Lett sold, to numerous persons, heroin supplied to them by Stanley R. Austin, and that as Austin's lieutenant appellant was intimately involved in all spheres of this enterprise.

Testimony of John Colligan

While absent without leave from the Marine Corps from May 3, 1968, to January 10, 1969, Private John D. Colligan worked for the Standard Paper Company, then for Trans World Airlines, and still later, in November and December 1968, bought, sold and used heroin in the Dupont Circle area of Washington, where he was known as "Shiloh" (Tr. 3-4, 6, 18).

On November 2, 1968, Colligan leased apartment 607 at 1816 New Hampshire Avenue, N.W. (Tr. 5).[3] Shortly thereafter he met Mary Reilly, a narcotics user and resident of the same building, and through her he became acquainted with Stanley R. Austin (Tr. 9-14). Several days after meeting Austin, appellant approached Colligan and asked if he wanted to sell heroin. Colligan asked to see "Beaver,"[4] whereupon appellant left, returning less than ten minutes later with Austin (Tr. 13-14, 16). The three

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[2] Stanley Austin failed to appear on the fifth day of trial. Eventually he reappeared, and on March 31, 1971, the trial judge granted Austin a new trial based on this Court's holding in *United States v. McPherson*, 137 U.S. App. D.C. 192, 421 F.2d 1127 (1969).

[3] Colligan's lease was admitted into evidence (Tr. 340).

[4] Austin's sobriquet.

discussed "selling heroin and how it was done" (Tr. 17). They agreed that Colligan would periodically receive quantities of capsuled heroin at an agreed per-capsule rate,[5] which he would sell, retaining his own "shot"[6] and any margin realized over the supply rate (Tr. 16-20). After receiving and selling twenty-five capsules on the day of this agreement, Colligan was resupplied with fifty "caps" the next morning (Tr. 18-19, 25).

In the weeks that followed heroin was delivered to Colligan "more than 10 but probably less than 50" times by appellant, Austin, or Sherril Rickert,[7] to either of whom, "it made no difference," Colligan tendered payment for what he had sold and returned any capsules he had been unable to sell (Tr. 33, 38, 46). In early November Austin gave Colligan a pistol, which appellant temporarily reclaimed in mid-December, saying he had just shot a "pusher" (Tr. 50, 52-53).

In late November Austin, appellant and Rickert mixed and "capped" heroin in Colligan's apartment (Tr. 54-61). In mid-December Colligan cleaned Austin's machine gun while appellant and Austin sifted heroin[8] (Tr. 61-71, 76). By Christmas Colligan was selling heroin to approximately twenty-seven customers (Tr. 39).

Shortly before Christmas Austin left town, and heroin became scarce (Tr. 99). Following his return in late December, Colligan witnessed an "exchange of words" be-

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[5] The rate ranged from $1.00 to $1.50 during November and December (Tr. 46).

[6] Himself a narcotics user, Colligan's dosage was three capsules per day at the time of this agreement (Tr. 18, 167).

[7] Miss Rickert, eighteen years of age at the time of trial, lived in apartment 502 at 1816 New Hampshire Avenue, which was leased to "Nathaniel and Sherril Austin." It was stipulated that, if called, Nathaniel Austin, Stanley's brother, would testify that in October 1968 Stanley told him he was "seeing a girl named Sherril" and asked Nathaniel to lease apartment 502 for his use (Tr. 340-341, 523).

[8] Later that month Colligan carried the machine gun, and Austin carried a pistol, as they attempted to collect money owed to Austin (Tr. 119, 196).

tween appellant and Austin: "Jerry [appellant] was no longer going to work for [Austin] or [Austin] for Jerry, however it was, and they were both going their separate ways." (Tr. 106.) In a subsequent conversation with Colligan, Austin indicated that Colligan or John Reilly, Mary Reilly's husband, would replace appellant and eventually replace Austin himself in the narcotics operation (Tr. 124). Early on the morning of January 1, 1969, Colligan advised Austin that he was returning to the Marine Corps and would no longer sell narcotics (Tr. 123-124).

Colligan testified that Earl M. Lett[9] was twice present in his apartment: once while heroin was being processed by appellant and Austin, and again when he accompanied and conversed with Austin (Tr. 88). He had also seen Lett with Austin in the latter's apartment (Tr. 90).

Having previously experienced the effects of other drugs, including "LSD, speed, morphine [and] methadrine," Colligan testified that the effect of heroin was distinctive and that the three capsules given to him by appellant and Austin on the day of their agreement, the contents of which he injected into himself, did contain heroin (Tr. 20-24). Likewise the powder being "capped" in Colligan's apartment, which he "tested" at Austin's suggestion, was in fact heroin (Tr. 60-61). During November and December 1968 Colligan's daily dosage increased to twenty-four capsules (Tr. 22). After terminating his association with Austin, Colligan stopped using heroin for several days and experienced withdrawal symptoms, including stomach cramps and back pains (Tr. 125).

Colligan's testimony was corroborated by that of William J. Rodgers, who testified that while living with Colligan during November and December 1968 he saw Colligan sell heroin capsules obtained from appellant and Austin and convey money thus obtained to appellant, Austin or Rickert (Tr. 219, 222, 233-235). He also observed heroin, which appellant and Austin referred to as

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[9] Colligan knew Lett only as "Spade Jimmie" (Tr. 49, 87).

"skag," being processed on several occasions in Colligan's apartment and once saw Colligan clean a machine gun at Austin's request (Tr. 238-242, 246-247). Rodgers saw Earl Lett at Colligan's apartment while heroin was being "capped" and again on Swann Street talking with Austin (Tr. 248-249). Rodgers used some of the powder being "capped" in Colligan's apartment and recognized it as heroin [10] (Tr. 242).

Testimony of Troussant and Irmagarde Lett

When introduced to appellant and Austin by his brother Earl, Troussant Lett noticed that appellant was armed with a pistol while Austin carried an attaché case (Tr. 376-377, 379). Later that evening he heard Earl tell appellant that "I was his baby brother and I didn't know anything about his business and not to mess with me." (Tr. 383-384.) On subsequent visits to his brother's home he saw him sift and "cap" heroin, which he sold to approximately thirty-four customers (Tr. 393-396, 399-401).[11] Troussant Lett himself assisted his brother in some of these sales (Tr. 392).

Lett testified that his brother informed him that he was "dealing in narcotics," that Austin was involved, that appellant was Austin's "right hand man," and that Austin had once accompanied him (Earl Lett) to Fourteenth Street, advised people in the neighborhood that Earl was "his boy" and warned them "not to bother him" (Tr. 389, 397-398).

When arrested on November 24, 1968, Earl instructed his brother to "tell Fantasia to call Beaver and see what they [could] do about getting him out." (Tr. 403-404.)

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[10] David J. Connolly, assistant to the Chief of the Mobile Task Forces for the Bureau of Narcotics and Dangerous Drugs, testified that virtually all heroin that reaches the United States originates in Turkey, that opium legally imported into the United States is strictly accounted for, and that no heroin is legally imported into the United States (Tr. 363, 367, 372-373).

[11] Troussant Lett testified that he heard the capsuled powder referred to as "little boys and little girls" in his brother's apartment and as "skag, coke, [and] heroin" elsewhere (Tr. 396).

Still incarcerated two days later, Earl Lett directed his brother "to tell Beaver if they [didn't] get [him] out he was going to blow the whole story." (Tr. 413.)

That evening Irmagarde Lett, Earl Lett's sister, received a telephone call from Austin (Tr. 465, 469, 483). Austin told her that Earl Lett was his "main man" and requested Miss Lett's help in getting him out of jail (Tr. 469). When she suggested that her brother had been framed and that she would tell the police all she knew if he were not released, though she in fact "didn't know anything," Austin cursed her and ended the conversation (Tr. 469-470). Later that evening Austin called again and, pursuant to an agreement then reached, met her the following morning and contributed $250 to her brother's bond (Tr. 472-480). When Earl Lett was released later that evening, Irmagarde heard her brother say to appellant, "You tell Beaver for me that he doesn't have to worry about me anymore because I am not going to work for him anymore . . . . I am going to get my money, and I am going to fix him." [12] (Tr. 489.)

ARGUMENT

Substantial independent evidence showed appellant's participation in a conspiracy to sell heroin, so that the jury was properly allowed to consider declarations of co-conspirators as substantive evidence of appellant's guilt.

(Tr. 3-125, 203, 219-222, 238-242, 376-401, 474, 484-485, 489, 668-670)

The extrajudicial statement of one co-conspirator in furtherance of a conspiracy may be admitted as sub-

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[12] Two defense witnesses were called: Theresa H. Scott, who testified that Stanley Austin had visited her and her husband from 7:30 p.m. on December 31, 1968, until 2:45 the next morning, and Sherril Rickert, who testified that Austin and appellant were both addicts who purchased narcotics from Colligan (Tr. 509-513, 523, 525-526). Miss Rickert failed to appear on the fourth day of trial and was never subjected to cross-examination. Her testimony was stricken (Tr. 567).

stantive evidence of another conspirator's guilt,[13] provided that there exists, at the close of the Government's case, substantial evidence of the accused's participation in the conspiracy independent of his confederate's hearsay declarations. *Delli Paoli* v. *United States*, 352 U.S. 232 (1957); *Krulewitch* v. *United States*, 336 U.S. 440 (1949); *Glasser* v. *United States*, 315 U.S. 60 (1942); *Delaney* v. *United States*, 263 U.S. 586 (1924). A defendant's own statement may constitute independent evidence of his participation in a conspiracy though it cannot be considered independent evidence as to the participation of a co-conspirator not present when the statement was made. *Laughlin* v. *United States*, 128 U.S. App. D.C. 27, 385 F.2d 287 (1966), *cert. denied*, 390 U.S. 1003 (1968); *May* v. *United States*, 84 U.S. App. D.C. 233, 175 F.2d 994, *cert. denied*, 338 U.S. 839 (1949).

Appellant's first argument, as we understand it, is that evidence of his conspiratorial participation was insufficient and that the trial court erred procedurally in admitting hearsay testimony prior to the presentation of such evidence. We consider this argument quite insubstantial.[14] Independent evidence at trial established that appellant himself enlisted Colligan as a heroin seller (Tr. 13-14); that he and Austin negotiated the agreement to supply Colligan with heroin (Tr. 17); that he delivered heroin and collected payment for it (Tr. 33, 38); that he and Austin processed heroin for street sale (Tr. 54-62, 238-242); that, armed with a pistol, he accompanied Austin to the home of Earl Lett, a man who processed and sold heroin (Tr. 379, 392-394); that he assisted Austin in obtaining Lett's release from jail (Tr. 474, 484-485); and that appellant was directed by Lett

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[13] Mutual liability among conspirators is premised upon the agency relationship created by the conspiratorial agreement. *Delli Paoli* v. *United States*, *supra*.

[14] We note that in moving for judgment of acquittal, appellant himself did not challenge the sufficiency of the independent evidence of his participation (Tr. 503-507, 599).

to tell Austin he would not continue to work for him (Tr. 489). Further it was shown that Lett was present at least once while appellant and Austin "cut" heroin in Colligan's apartment (Tr. 88). This non-hearsay testimony was more than sufficient to permit the jury to consider the declarations of Austin and Lett as substantive evidence of appellant's guilt. See *Laughlin* v. *United States, supra; Ladrey* v. *United States*, 81 U.S. App. D.C. 127, 155 F.2d 417, *cert. denied*, 329 U.S. 723 (1946).

Similarly, evidence that Mary Reilly received money from Austin to deliver to her husband (Tr. 10-11); that her husband was expected to succeed appellant in the hierarchy of the conspiracy (Tr. 124); and that she bought heroin from Austin and introduced Colligan to prospective purchasers (Tr. 38, 203) warranted the inference that she too was a participant in the conspiracy. *See United States* v. *Rich*, 262 F.2d 415 (2d Cir. 1959).[15]

Early in the trial of this case, the court indicated that the jury would not be allowed to consider hearsay statements of alleged co-conspirators unless the conspiracy had been established (Tr. 29). Subsequently, appellant's motion for judgment of acquittal was denied, and the jury was instructed that "in determining whether a particular defendant was a member of the conspiracy, if any, you may consider only his own acts and statements. He cannot be bound by the acts or declarations of other participants unless and until it is established that a conspiracy existed, and that he was one of its members." (Tr. 669-670.) This procedure was quite proper and is in accord with the case law of this and other jurisdic-

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[15] As to other "instances hearsay testimony was admitted from sources that were never identified as co-conspirators," cited on pages 6 and 7 of appellant's brief, we note that in both shooting incidents referred to by Colligan, appellant himself was either the declarant or was present when the statement was made (Tr. 52-53, 86). *See United States* v. *Harris*, —— U.S. App. D.C. ——, 437 F.2d 686 (1970). Also we submit that evidence of the street price of a commodity such as heroin must, as a practical necessity, be based upon out-of-court statements of purchasers. *See Caten* v. *Salt City Movers*, 149 F.2d 428 (2d Cir. 1945).

tions, recognizing the well-established rule that a trial court may admit hearsay statements of co-conspirators prior to proof of the accused's participation. *E.g.*, *United States* v. *Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970); *Beckwith* v. *United States*, 367 F.2d 458 (10th Cir. 1966); *Parente* v. *United States*, 249 F.2d 752 (9th Cir. 1957); *Ladrey* v. *United States*, *supra*. The independent evidence of appellant's participation in a conspiracy to sell heroin was not only substantial but overwhelming. The procedure employed by the court in admitting declarations of co-conspirators was proper.[16]

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[16] Two other points raised by appellant deserve but brief mention. Appellant processed and delivered a white powder substance referred to as "heroin" and "skag" (Tr. 241, 396); a substance which, when self-administered by two heroin users, one of whom experienced withdrawal symptoms after ceasing its use, produced the recognizable physical effects of heroin (Tr. 20-24, 60-61, 125, 242); a substance which, when sifted, diluted and "capped," was sold as heroin to a substantial clientele at prices exceeding $1.00 per capsule (Tr. 39-40); a commodity the nature of which required that its dealers be armed with pistols and a machine gun (Tr. 50, 69-70, 379). Such evidence clearly supports the inference that the substance appellant dealt with was heroin. *Cf. United States* v. *Agueci*, 310 F.2d 817 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963).

The jury was instructed that "the testimony of an accomplice should be received . . . with caution and scrutinized with care. Again, you should give it such weight as, in your very good judgment, you think it is fairly entitled to receive. You may convict a person accused of a crime upon the uncorroborated testimony of an accomplice only if you believe that the testimony of an accomplice proves the guilt of the defendant beyond a reasonable doubt." (Tr. 668.) This instruction was sufficient under applicable law. *E.g.*, *Bishop* v. *United States*, 100 U.S. App. D.C. 88, 243 F.2d 32 (1957).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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